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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STEVEN ALLEN RICE; ANITA VIVIAN MILLER; CHERYL SAUBEN MIRANDA; ELLEN RICE WARD; BOBBIE RAY PRECKWINKLE; and LAVERNE SAUBEL NELSON,

Petitioners,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation; UNITED STATES OF AMERICA; 33.49 ACRES OF LAND IN THE COUNTY OF RIVERSIDE, STATE OF CALIFORNIA; et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Rice, Miller, Miranda, Ward, Preckwinkle and Nelson respectfully petition this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for Ninth Circuit entered on August 26, 1982.

QUESTIONS PRESENTED

1. Are 25 U.S.C. §357 and 25 U.S.C. §§323-4 *alternative* means by which a party possessing the power of eminent domain may acquire a right of way for purposes of electrical transmission lines across lands allotted in trust to an Indian by the United States, or does the latter scheme from 1948 displace or implicitly repeal the former scheme from 1901 to the extent of overlap?

2. When proceeding under 25 U.S.C. §357, must a party possessing the power of eminent domain under California law allege in its complaint to condemn a right of way across allotted land held in trust for Indians by the United States that the condemnor's intended use of the land (1) is a more necessary public use, or (2) will not unreasonably interfere with or impair the continuance of the public use as it exists or may reasonably be expected to exist in the future as allotted Indian trust land?

3. Is the question of whether lands allotted to Indians and held in trust by the United States for such allottees a question of federal law or a question of state law? If a question of federal law, are the Indian allottees deprived of a substantive right afforded by federal law in violation of 28 U.S.C. §2072, the Rules Enabling Act, if the allegations described in Question No. 2 above are omitted from the condemnor's complaint?

4. Has California disabled itself, and all those acting under its authority, from taking advantage of 25 U.S.C. §357 by limiting by state statute the venue for all condemnation actions only to state superior court, rather than also to federal district court as this Court required in *Minnesota v. U.S.*, 305 U.S. 382 (1939)?

PARTIES

The parties to this proceeding are the six Indian allottees (Steven Allen Rice, Anita Vivian Miller, Cheryl Saubel Miranda, Ellen Rice Ward, Bobbie Ray Preckwinkle, and Laverne Saubel Nelson); the Southern California Edison Company (a corporation); the United States; approximately 33.49 acres of land located in the County of Riverside, State of California; Goodyear Service Stores; John H. Wingate, Jr., Timothy J. White; John R. Stotts, Jr.; Vernon H. Halbrook, d/b/a Wingate Air Conditioning Service; and unknown others.

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The opinion of the District Court is unreported and appears as Appendix A. The opinion of the Court of Appeals is as yet unreported and appears as Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on August 26, 1982. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. The pivotal statute, 25 U.S.C. §357, Section 3 of the Indian Appropriations Act of March 3, 1901, 31 Stat. 1058, 1084, provides:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

2. The Act of February 5, 1948, 62 Stat. 17, the first six sections of which are codified as 25 U.S.C. §§323-8, provides:

> The Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.
>
> Sec. 2. No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984) as amended; the Act of May 1, 1936 (49 Stat. 1967), shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual

Indians may be granted without the consent of the individual Indians if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Sec. 3. No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

Sec. 4. This Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed here-by.

Sec. 5. Rights-of-way for the use of the United States may be granted under this Act upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

Sec. 6. The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of this Act.

Sec. 7. This Act shall not become operative until thirty days after its approval.

3. California Code of Civil Procedure §1240.510 provides that:

Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future. Where property is sought to be acquired pursuant to this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

4. California Code of Civil Procedure §1240.610 provides that:

> Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated. Where property is sought to be acquired pursuant to this section, the complaint, and the resolution of necessity if one is required, shall refer specifically to this section.

5. California Code of Civil Procedure §1250.010 provides that:

> Except as otherwise provided in [certain sections not applicable here], all eminent domain proceedings shall be commenced and prosecuted in the superior court.

STATEMENT OF THE CASE

On September 25, 1979 plaintiff, the Southern California Edison Company (a public utility possessing the power of eminent domain under California law in order to carry out its functions under a prior certificate of public convenience and necessity, hereinafter referred to as "SCE") filed a complaint in eminent domain in the U.S. District Court for the Central District of California to condemn certain rights of way for purposes of electrical transmission lines across certain parcels of land included in the Agua Caliente Indian Reservation to the east of the City of Palm Springs, California, and allotted to petitioners Rice, Miller, Miranda, Ward, Preckwinkle, and Nelson (hereinafter, the "Indian allottees"). The said allotments were made pursuant to (1) the General Allotment Act of February 8, 1888 (25 U.S.C. §331 et seq., 24 Stat. 388); (2) the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712); (3) the Act of March 2, 1917 (39 Stat. 969); and the Agua Caliente Equalization Act of September 21, 1959 (25 U.S.C. §951 et seq., 73 Stat. 602) and were accomplished by the issuance of patents by the United States declaring that the United States would hold

the particular parcels in trust for "the sole use and benefit of" the respective allottee for at least 25 years from the date of issuance in 1961. SCE alleged jurisdiction only under 25 U.S.C. §357.

By way of defense, the Indian allottees asserted that SCE lacked the power to take rights of way across their allotted trust lands for the following reasons:

First, condemnation of rights of way is not available to SCE under 25 U.S.C. §357 because that subject is more specifically governed by 25 U.S.C. §§323-4.

Second, the complaint failed to state a claim on which relief could be granted because it lacked the allegations of more necessary public use or not incompatible public use required by California Code of Civil Procedure §§1240.610 and 1240.510, which allegations were required because the Indian allottees' allotted trust lands were already devoted to a public use or a public purpose.

Third, California has disabled itself, and all others acting under its authority, from taking advantage of 25 U.S.C. §357, even if that procedure were otherwise available, because California Code of Civil Procedure §1250.010 requires *all* condemnation actions to occur in state superior court, making no provision for actions such as this to occur in federal district court, as this Court has held in *Minnesota v. U.S.*, 305 U.S. 382 (1939).

The District Court rejected each of these contentions and entered partial judgment for SCE on September 10, 1980. Based on a stipulation regarding just compensation and preserving the Indian allottees' right to appeal, the District Court entered a final judgment on August 17, 1981. The Indian allottees filed a timely notice of appeal and raised the same issues to the Court of Appeals for the Ninth Circuit, which affirmed on August 26, 1982.

The Indian allottees now seek review of this judgment in order to present to this Court important questions of federal Indian law on which this Court reserved judgment in *U.S. v. Clarke*, 445 U.S. 253, 254, n. 1 (1980). These questions are of great practical importance to these six Indian

allottees, and to all Indian allottees across the nation, because they deal with whether the allotted trust lands of all such Indian allottees are subject to taking under 25 U.S.C. §357 for rights of way more or less at will by any party possessing the power of eminent domain under state law, or whether it is necessary, instead, for such would-be condemnors to proceed under 25 U.S.C. §§323-4, which permit such rights of way to be granted "subject to such conditions as [the Secretary of the Interior] may prescribe" for the protection of the Indians.

The allottees of the Agua Caliente Indian Reservation fought long and hard to obtain their allotments. Even though such allotments had been authorized by the General Allotment Act of February 8, 1888 (25 U.S.C. §331, et seq., 24 Stat. 388) and the Mission Indian Relief Act of January 2, 1891 (26 Stat. 716), and even though Congress specifically *directed* the Secretary of the Interior to make these allotments by Section 3 of the Act of March 2, 1917 (39 Stat. 969, 976), the Secretary refused to act. Members of the tribe obtained a determination of the Secretary's duty to allot in *Arenas v. U.S.*, 322 U.S. 419 (1944), which was further clarified in further litigation leading to the Agua Caliente Equalization Act of September 21, 1959 (25 Stat. §951, et seq., 73 Stat. 602) under which their patents were finally issued in 1961 declaring that the United States would hold the various parcels "in trust for the sole use and benefit" of the respective allottees. After all this effort to secure their allotted land base, the allottees now seek a determination of whether their hard-won trust allotments are available, essentially for the asking, to any party with a state-granted power of eminent domain for rights of way.

This Court noted, but did not reach, these issues in *U.S. v. Clarke*, 445 U.S. 253, 254, n. 1 (1980). The Court of Appeals for the Tenth Circuit has joined that for the Ninth Circuit in resolving these points against the Indians in *Yellowfish v. City of Stillwater*, ____F.2d____, No. 81-1948 (April 28, 1982), but the U.S. District Court for the District of Nebraska has resolved the same issues in favor of the

Indians in *Nebraska Public Power District v. 100.95 Acres of Land, etc., et al.*, ____F.Supp.____, No. 79-0-411, June 4, 1982, appeal pending. These questions are of great significance to all those who seek or resist condemnation of rights of ways across allotted Indian trust lands which, although previously often remotely located, are now increasingly located in the path of urban expansion. The issues are ripe for determination and the present six Indian allottees now seek their resolution for the benefit of all Indian allottees and all those who seek to condemn rights of way across their allotted trust lands.

REASONS FOR GRANTING THE WRIT

I.

Whether 25 U.S.C. §357 and 25 U.S.C. §§323-4 are alternative ways for a would-be condemnor to obtain a right of way across allotted trust lands, or whether the latter displaces or repeals the former to the extent of overlap, is an important question of federal Indian law not yet passed upon by this Court.

Prior to 1901, there was no way for a would-be condemnor to obtain any interest in the lands of federal Indian reservations which had been allotted under the General Allotment Act of February 8, 1888 (25 U.S.C. §331 et seq., 24 Stat. 388). By 1900, more than 60,000 allotments, covering more than 5,500,000 acres, had been approved and the process was slowing down. Cohen, *Federal Indian Law*, 210-1 (1942). The purpose of this policy of allotment "was to end tribal land ownership on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976). See also *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). Allotted lands were to

remain in trust for 25 years, 25 U.S.C. §348, after which "every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 25 U.S.C. §349. When enacted in 1901, 25 U.S.C. §357 was a part of the entire allotment program, which simply made one group of state laws, those governing condemnation proceedings, applicable to allotted lands several years prior to the expiration of the trust period, when *all* state laws would apply.

The allotment policy proved disastrous. Between its beginning in 1887 and 1934, it and the sale of so-called "surplus lands" had cut Indian land holdings from 138,000,000 to 48,000,000 acres. See Hearings on H.R. 7902, Committee on Indian Affairs, 73d Cong.2d Sess. 15-18 (1934). The policy of allotment "was repudiated in 1934 by the Indian Reorganization Act [IRA], 48 Stat. 984, now amended and codified as 25 U.S.C. §§461 *et seq.*" *Mattz v. Arnett, supra*, 412 U.S. at 496 n.18, quoted in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478-79 (1976). See also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973) ("Unquestionably, the [Indian Reorganization] Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment.") Section 1 of the IRA, 25 U.S.C. §461, prohibited further allotments. Section 2, 25 U.S.C. §462, extended the existing periods of trust "until otherwise directed by Congress." Section 3, 25 U.S.C. §463(a), authorized the Secretary to restore remaining, undisposed surplus lands to tribal ownership. Section 4, 25 U.S.C. §464, prohibited any "sale, devise, gift, exchange, or other transfer of restricted Indian lands . . ." except as provided in the Act. And Section 5, 25 U.S.C. §465, appropriated funds for the acquisition of additional tribal and allotted lands for Indians. While none of these provisions of the Indian Reorganization Act is directly applicable to the present case, they do demonstrate the extent to which federal Indian policies changed between 1901 and 1934.

The 1948 Indian Right of Way Act, 25 U.S.C. §§323-8, embodies and furthers the policies of the IRA. This is most evident in Section 2 of the 1948 Act, 25 U.S.C. §324. It precludes secretarial grants of rights of way over tribal lands without the consent of tribes organized under the IRA and other related laws. It also requires the allottees' consent for rights of way over allotted lands except in specifically described circumstances when obtaining the consent of all those with interests in the allotment would be impractical or unfair. These requirements are in keeping with the spirit of the IRA, to "turn . . . over to the Indians a greater control of their own destinies." *Morton v. Mancari*, 417 U.S. 535, 553 (1974). They would be nullified if rights of way across allotted lands could be obtained by condemnation pursuant to 25 U.S.C. §357.

When recent expressions of Congress' policies toward Indians undermine or are inconsistent with prior laws, this Court has given effect to the subsequent enactment. In *Bryan v. Itasca County*, 426 U.S. 373, 386-87 (1976), an act that was a product of the termination era of the 1950's was construed in a manner that was more consistent with the Indian Civil Rights Act of April 11, 1968, 25 U.S.C. §1301, et seq., 82 Stat. 73, 77.

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477-79 (1976), is even more directly on point. It held that a provision of the 1887 General Allotment Act, 25 U.S.C. §349, which subjects allottees to the civil and criminal laws of the states after issuance of fee patents, had been impliedly repealed as to reservation allotments. The Court noted that Congress had repudiated the allotment policy in 1934 and "by its more modern legislation has evinced a clear intent to eschew any such "checkerboard approach within an existing Indian Reservation." 425 U.S. at 479. This case is identical in that the allotment policies on which §357 was predicated have been repudiated and, by its more recent legislation, i.e., the IRA and the 1948 Right of Way statute, 25 U.S.C. §§323-4, Congress has evinced a clear intent to prevent the alienation or transfer of allotted lands without the consent of the Indian landowners.

In these circumstances, the rules enunciated and followed in *Bryan* and *Moe* inescapably lead to the conclusion that rights of way across allotted Indian lands are now governed by 25 U.S.C. §§323-4, while 25 U.S.C. §357 remains applicable only to non-right of way situations, such as the condemnation of the entire interest. As stated in *Bryan, supra*, 426 U.S. at 388 n.14:

> [C]ourts "are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship."

Moe carries this rule one step further by holding that current congressional policies should be implemented even when they result in an otherwise disfavored partial repeal by implication.

It would be most anomalous indeed if the consent of Indian allottees were a prerequisite to grants of rights of way by the Secretary, the Indians' trustee, but rights of way could be obtained by condemnation without the approval of either the Secretary or the allottees. This Court left open the question of the interrelationships between 25 U.S.C. §357 and 25 U.S.C. §§323-4 in both *Minnesota v. U.S.*, 305 U.S. 382, 391 (1939) and *U.S. v. Clarke*, 445 U.S. 253, 254, n. 1 (1980). The question is now ripe for review because of its recurrence in the Eighth, Ninth, and Tenth circuits and because of the cloud that these unanswered questions cast over all rights of way acquired across allotted trust lands since 1948 on the supposition that the more stringent requirements of 25 U.S.C. §§323-4 could be avoided by the simple expedient of relying instead only on 25 U.S.C. §357. These questions will recur, and this cloud will persist, until this Court reaches these issues which it reserved for future consideration in *Minnesota* in 1939 and in *Clarke* in 1980.

II.

The Court of Appeals' opinion frustrates Congressional purposes in allowing allotted trust lands to be treated as if they served no public purpose or use.

Even if 25 U.S.C §357 is otherwise available for the condemnation of a right of way across allotted trust lands, all such condemnations must occur "under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned." 25 U.S.C. §357. Thus, any protection afforded to a condemnee under state law must be respected, not only because the terms of 25 U.S.C. §357 so state, but also because the Rules Enabling Act of June 25, 1948, as amended, 28 U.S.C. §2072, 62 Stat. 961, requires that the federal rules of civil procedure, including Rule 71A(k) under which this action occurred, "shall not abridge, enlarge or modify any substantive right."

California Code of Civil Procedure §§1240.510 and 1240.610 require that any complaint in eminent domain contain allegations that the condemnor's intended public use or purpose for the subject property is "more necessary than" or "not incompatible with" the present public use or purpose of the property, if any. The public purpose of allotted trust lands is clear from this Court's prior references to how retaining such lands in restricted trust status is intended to give Indian allottees (1) time and opportunity to learn non-Indian ways leading toward eventual assimilation into the non-Indian society at the end of the trust period, (2) a place to live and to become self-sufficient, and (3) protection against improvident conveyances. See *Montana v. U.S.*, ____U.S.____, 101 S.Ct. 1245, 1253 (1981); *U.S. v. New Mexico*, 438 U.S. 696, 698 (1978); *Arizona v. California*, 373 U.S. 546, 598, 600-601 (1963); *Squire v. Capoeman*, 358 U.S. 1, 10 (1956); *U.S. v. Rickert*, 188 U.S. 432, 437, 441 (1903).

While the Court of Appeals acknowledged these points, it nevertheless held that allotted lands were not " 'appropriated to public use' in the sense contemplated by the California statute." This may be true as a matter of state law, but the question is rather one of federal law. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 678 (1974). The federal law on this point is as noted above, and the treatment of this question by the Court of Appeals as a matter of state law deprives the Indian allottees of the kind of "substantive right" protected by 25 U.S.C. §357 and 28 U.S.C. §2072, to their obvious detriment. Given the enormous threat to the remaining Indian trust land base and the frustration to the above Congressional policies of ending the erosion of this trust land base, the need for this Court to re-affirm respect for this substantive right is of enormous importance for all Indian allottees throughout the country. Quirks of state law should not thus be permitted to frustrate the above clear indications of Congressional intent to protect such "substantive rights" of allottees during the condemnation process. In this sense, the situation is akin to that which led this Court to grant certiorari in *U.S. v. Clarke, supra*, "to decide the question '[w]hether 25 U.S.C. [§]357 authorizes a state or local government to 'condemn' allotted Indian trust lands by physical occupation.' " *Id.*, 445 U.S. at 254. So too here.

III.

California has overstepped its own disability to take advantage of 25 U.S.C. §357 by requiring all condemnation actions to occur in state court, rather than federal district court, as this Court has held.

In its leading case of *Minnesota v. U.S.*, 305 U.S. 382 (1939), this Court emphasized how all actions under 25 U.S.C. §357 *must* occur in federal district court, exclusive of *any* state court, as a matter of the waiver of federal sovereign immunity encompassed by 25 U.S.C. §357.

However, as noted above, both the language of 25 U.S.C. §357 and Rule 71A(k) of the Federal Rules of Civil Procedure require that all condemnation actions must occur "under the laws of the State" where the land sought to be condemned is located. California Code of Civil Procedure §1250.010 requires all condemnation actions to occur *only* in state superior court. This provision of state law is applicable as a "substantive right" protected by this provision of the Rules Enabling Act (28 U.S.C. §2072) and by Rule 71A(k), as well as 25 U.S.C. §357, so that it must be respected. This is not a case of a state statute divesting a federal district court of jurisdiction which it would otherwise have. Nor is it a question of venue. Rather, it is simply a substantive provision of state law by which the state limits itself to the use of one particular named state court, exclusive of all other courts.

Therefore, until either California expands its statute to allow such actions to occur in federal district court, or until Congress amends 25 U.S.C. §357 to permit such actions to occur in state court, California has disabled itself and all those acting under its authority from taking advantage of 25 U.S.C. §357. Unless this Court grants review of this point, California will continue to overstep its own self-imposed limitation on choice of courts for such actions, and Indian allottees will continue to be deprived of this additional supposedly-protected "substantive right" in violation of language of 25 U.S.C. §357 and the Rules Enabling Act.

CONCLUSION

For the reasons noted above, the six Indian allottees respectfully urge the Court to grant their petition so that these important and recurring questions of federal Indian law, previously twice reserved by this Court, can be answered to provide guidance to the lower federal courts in deciding these frequently-raised issues, and to clarify the

validity of all rights of way over allotted trust lands acquired under 25 U.S.C. §357 since 1948.

Respectfully submitted,

Art Bunce, Counsel of Record for
Petitioners Rice, Miller, Ward,
Miranda, Preckwinkle, and Nelson

Dated: November 24, 1982